IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1361

DECOTO AIRCRAFT, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Attorney for Petitioner
Decoto Aircraft, Inc.

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SUBJECT INDEX

	Page
Opinions Below	2
Grounds for Jurisdiction in This Court	3
Constitutional Provisions and Statutes Involved	4
Questions Presented	4
Statement of the Case	5
(a) Basis for Federal Jurisdiction in First Instance	5
(b) Summary of Facts and Procedure before the Board	6
(c) The Decision of the Court of Appeals	9
Argument for Granting the Writ	9
Conclusion	15
Appendix Index	16

CASES

Henderson Trumball Supply Corporation v. N.L.R.B. 501 F.2d 1224 (1974)	11
Magnesium Casting Co. v. N.L.R.B., 401 U.S. 137, 76 L.R.R.M. 2497 (1971)	13
National Furniture Company, Inc., 119 N.L.R.B. 328 (1957)	10
Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971)	12
N.L.R.B. v. Ancillary Services, Inc., 478 F.2d 96 (1973)	12
N.L.R.B. v. Bata Shoe Company, Inc., 377 F.2d 821 (4th Cir. 1967), cert. den., 389 U.S. 917 (1967)	14
N.L.R.B. v. Commercial Letter, Inc., 455 F..2d 109 (8th Cir. 1972), opinion modified, 455 F.2d 109	14
N.L.R.B. v. Indiana & Michigan Electric Co., 318 U.S. 9 (1943)	14

CASES Con't.	Page
Orleans Manufacturing Company, 120 N.L.R.B. 630 (1958)	10
Pittsburgh Plate Glass Co. v. N.L.R.B. 313 U.S. 146, 8 L.R.R.M. 425 (1941)	13
Tidewater Oil Co., v. N.L.R.B., 398 F.2d 363 (2nd Cir. 1966)	15
Wilson-Sinclair Co., 191 N.L.R.B. 341 (1971)	11

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Decoto Aircraft, Inc. (herein sometimes referred to as "Decoto"), Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed and entered in the above entitled cause on March 6, 1975.

OPINIONS BELOW

This Petition results from a decision of the United States Court of Appeals for the Ninth Circuit affirming and enforcing without modification the Decision and Order of the National Labor Relations Board (hereinafter referred to as the "Board"). These decisions, in chronological order, are as follows:

1. On June 14, 1973, the Board issued its Decision and Direction of Second Election in the representation case, No. 19-RC-6371, in this matter. This decision is reproduced herein as Appendix "A" to this Petition. This decision was unreported.

2. On April 3, 1974, the Board issued its Decision and Order in the unfair labor practice case, granting the motion for summary judgment requested by the Board's General Counsel, ordering Decoto, Petitioner herein, to cease and desist from refusing to bargain with the Union. This decision has been reported at 209 N.L.R.B. No. 149, 85 L.R.R.M. 1615 (1974).

This decision is reproduced herein as Appendix "B" to this Petition.

3. The decision of the United States Court of Appeals for the Ninth Circuit (hereinafter referred to as the "Opinion") affirmed and enforced *in toto* the decision of the Board. The opinion is reported as –F.2d–, 88

L.R.R.M 3231 (9th Cir. 1975), and is reproduced herein as Appendix "C" to this Petition.

GROUNDS FOR JURISDICTION IN THIS COURT

The Opinion below decides and applies several important questions of federal law contrary to decisions of other Courts of Appeals as well as certain important questions of first impression, which until now have not been, but ought to be, decided by this Court. On this basis, petition is made to this Court pursuant to U.S.C.A. Section 1254 and U.S. Supreme Court Rule 19, for certiorari to review the opinion below.

The Opinion below was dated and entered on March 6, 1975. The Petitioner herein on April 4, 1975 sought an application for a rehearing *en banc* by the Ninth Circuit, but the Court considered the application to be too late. The Petitioner herein then filed on or about April 16, 1975 with the Ninth Circuit a motion to recall the mandate of the Court, and on the same date Petitioner herein filed a motion to file a late application for a rehearing *en banc*. These motions were denied by the Ninth Circuit Court of Appeals by an order dated May 7, 1975.

An application has been made to the Ninth Circuit Court of Appeals for a stay of mandate of its order to November 15, 1975. The Ninth Circuit has not yet ruled on this request.

No order has been sought or granted for an extension of time in which to petition for Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provision involved herein is the due process clause contained within the Fifth Amendment to the United States Constitution. The statutes involved in the cause are contained within the Labor Management Relations Act (hereinafter referred to as the "Act"), Sections 7; 8 (a) (1), (5); 9 (a) (1), (c) (1) (4), (d); 10 (b), (c), (e), as Amended, (29 U.S.C.A. Sections 157; 158 (a) (1) (5); 159 (a) (1), (c) (1) (4), (d); 160 (b), (c), (e)), as well as Federal Rules of Civil Procedure 43 (c) (28 U.S.C.A.), and the Rules and Regulations of the National Labor Relations Board, Sections 102.62 and 102.69 (c). The constitutional provision and the statutes cited, in pertinent part, are printed verbatim and are reproduced herein as Appendix "D" to this Petition.

QUESTIONS PRESENTED

1. Did Decoto timely present sufficient evidence so as to raise a substantial issue of fact as to the report of the Board's regional director on objections to the election, thereby entitling Decoto to a hearing on those issues of fact, where the regional director found that none of the objections filed by the Union, standing alone, has merit,

but on the basis of the regional director's later investigation he recommended setting aside the election based on his "additional findings" made *ex-parte,* which factual findings Decoto's attorney rebutted in detail in timely-filed exceptions signed by the attorney, but not by sworn affidavits?

2. Did the Board, by quashing Decoto's subpoena duces tecum for any evidence to support the regional director's findings of fact made *ex parte* and by refusing to grant Decoto's timely requests for any hearing on substantial issues of fact, and by the granting of the General Counsel's motion for summary judgment after Decoto presented to the Board sworn statements contradicting the regional director's findings of fact made *ex parte,* violate the requirements of due process?

3. Did the Stipulation for Certification Upon Consent Election Agreement, signed by the regional director, the Union, and Decoto, constitute a contract between the three named parties, thereby entitling Decoto to a decision on the merits of the objections by the Board, not the regional director?

STATEMENT OF THE CASE

(a) BASIS FOR FEDERAL JURISDICTION IN FIRST INSTANCE

The action herein was brought before the Board on

charges filed alleging that Decoto had violated the Act; more particularly, Sections 8 (a) (1) and (5) thereof, as well as other sections of the Act not now in issue. The court below had jurisdiction by virtue of Sections 10 (e) and (f) of the Act.

(b) SUMMARY OF THE FACTS AND PROCEDURE BEFORE THE BOARD

The Union filed a petition for an election among employees of Decoto on October 24, 1973. Balloting conducted on November 28, 1973 showed that the Union received 45 votes and there were 49 "no" votes. The Union filed timely objections to the election.

On March 30, 1973 the Board's regional director served on the Union and on Decoto his Report on Objections To Election (hereinafter called "Report"). (The Report is reproduced herein as Appendix "E" to this Petition.) In his Report the regional director found no merit to Union Objections Nos. 1 and 2. Objection No. 3 alleged that Decoto transfered an employee from the day to the night shift and that employee became the Union's observer in the election. The regional director found that the transfer referred to in Objection No. 3 was not, when looked at alone, an act of interference with the election.

However, the regional director in his Report made five "Additional Findings" which he believed related

somehow to Objection No. 3, the transfer of an employee, and he recommended that the election be set aside.

Decoto filed timely Exceptions to the regional director's Report. In said exceptions, signed by Decoto's attorney, Decoto stated its position on Objection No. 3, that the transfer of the employee was made in accord with normal practice for business reasons, prior to Decoto's knowlerge that the employee was a Union supporter or that he would later be the Union's observer in the election.

In Decoto's Exceptions, each of the regional director's "Additional Findings" was discussed in some detail. Decoto contended that the subject of each additional finding is irrelevant, but stated that the "facts" as found by the regional director in his *ex parte* investigation are for the most part, either denied or erroneous or incomplete. Decoto in its Exceptions summarized its version of the facts and stated that if the Board finds any of the regional director's "Additional Findings" to be relevant that Decoto requests a hearing and will provide witnesses to testify to support Decoto's version of the facts. A copy of Decoto's Exceptions is reproduced herein as exhibit "F" to this Petition.

The Board on June 14, 1973 issued its "Decision and Direction of Second Election." (Appendix "A" to this Petition). The decision is *pro forma,* adopting the regional director's *ex parte* decision as if no Exceptions had been

filed. However, in footnote 1 the Board states:

> In the absence of exceptions thereto, the Board adopts *pro forma* the Regional Director's recommendation that Objections 1 and 2 be dismissed. The Employer's request for a hearing is hereby denied because the Employer, having received *reasonable notice* of specific conduct alleged to have interferred with the election, refused to present *any evidence* rebutting these allegations to the Regional Director. (Emphasis supplied).

A second election was conducted which the Union won, by one or two votes. Decoto refused to bargain with the Union, questioning whether the Union represented a majority of the employees. The regional director on October 17, 1973 issued a complaint. The complaint's only allegation of any unfair labor practice by Decoto is the refusal to recognize and bargain with the Union which it is alleged violated Section 8 (a) (5) and derivitively, Section 8 (a) (1) of the Act.

Decoto in its answer alleged that the certification by the Board of the Union was improper and that the Union has not represented a majority of its employees.

The Board's regional director scheduled a hearing before an administrative law judge for November 20, 1973. Decoto then issued a *subpoena duces tecum* to the Regional Director's agent who investigated the Union's objections, to appear and testify and to produce certain employee statements concerning the regional director's *ex parte* find-

ings. Decoto's appeal from the denial of this request was denied November 2, 1973 by telegram of the Board's General Counsel, who stated in part:

> This acton is without prejudice to your right to request affidavits of witnesses called on behalf of the General Counsel or the Charging Party after their direct testimony in the hearing in this matter. [R.51].

The regional director then promptly filed with the Board a motion for summary judgment. The Board quickly granted the motion and issued a notice to show cause.

Decoto timely filed its answer to the motion together with sworn affidavits, each rebutting in detail the findings of fact made by the Regional Director in his Report on objections, and again requesting a hearing on the issues of fact.

The Board issued its Decision and Order (Appendix "B" to this Petition), found that Decoto "is now attempting to relitigate issues which were decided adversely to it in the underlying representation proceeding" and ordered Decoto to bargain with the Union.

(c) THE DECISION OF THE COURT OF APPEALS

The Court of Appeals enforced the Board's order without change.

ARGUMENT FOR GRANTING THE WRIT

1. The decision below that Decoto did not offer *any*

evidence to rebut the regional director's additional findings of fact is contrary to decisions of other Courts of Appeal as to what constitutes "any evidence." This finding becomes crucially important when considered in the view that the federal Courts of Appeal almost uniformly hold that an employer (or a union) is entitled to a hearing on objections to an election if there are substantial and material issues of fact timely presented. The Ninth Circuit has so held in at least five cases, which were presented to the Ninth Circuit in Decoto's brief.

Both the Board and the Ninth Circuit found the regional director's "additional findings" to be material. The issues are thus presented to this Court (1) whether those additional findings were outside the scope of the Union's objections, (2) whether Decoto, in the representation case before the Board, had an obligation to present any evidence to raise issues of fact as those additional findings, and (3) if so, whether Decoto met that obligation by furnishing "any evidence."

The Union's three objections were specific. However, they did not allege any acts or conduct closely related to the conduct found by the regional director in his additional findings to have occurred. Decoto was entitled to rely upon the Board's almost uniform rules that objections must name specific conduct alleged to have occurred. *National Furniture Company, Inc.*, 119 N.L.R.B. 328 (1957); *Orleans Manufacturing Company*, 120 N.L.R.B. 630 (1958); *Wilson-Sinclair Co.*, 191 N.L.R.B. 341 (1971).

Decoto's Exceptions to the regional director's additional findings in his Report were in as much detail as the regional director's findings. It would be difficult to be more specific in Exceptions, where the regional director's findings do not name or otherwise identify any witness except Decoto's supervisory witnesses, and in the investigation and later by sworn affidavits they denied the substance of most of the findings made by the regional director.

The Exceptions were signed by Decoto's attorney. The Second Circuit, in *Henderson Trumball Supply Corporation v. N.L.R.B.*, 501 F.2d 1224 (1974), in directing a hearing, recently held that statements signed by the employer's attorney should be accorded the same weight as would be attributed to a pleading so signed, citing F. R. Civ. P., Rule 11.

Decoto contends that its Exceptions to the regional director's Report constitutes a "pleading" within the meaning of Rule 11, Fed. R. Civ. Proc. Rule 11 states in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good grounds to support it; and that it is not interposed for delay.

The decision of the Board and of the Ninth Circuit have the effect of striking a pleading, Decoto's Exceptions.

The Sixth Circuit has held that a party may make an offer of proof by a statement signed by its attorney. *N.L.R.B. v. Ancillary Services, Inc.*, 478 F.2d 96 (1973).

Decoto contends that its Exceptions here were in as much or more detail than the four page letter found by the Seventh Circuit to be "not a mere 'conclusory statement'," in *Nickols v. Gagnon*, 454 F.2d 467, 469 (7th Cir. 1971), cert. den 408 U.S. 925. That Court opinion does not reproduce the letter but it was substantially shorter than Decoto's detailed Exceptions herein.

Neither the statute nor the Board's Rules and Regulations require that Exceptions to a regional director's report on objections be supported by signed affidavits in order to raise a substantial issue of fact. If the Board requires a greater degree of proof than do federal courts, the Board should amend its Rules and Regulations to give parties practicing before the Board clear notice of such stringent requirements.

2. Decoto has consistently and timely requested a hearing in both the representation case and the unfair labor practice case. The Board denied all of the requests, and granted the motion for a summary judgment, requested by the Board's General Counsel.

This Court has approved the summary judgment procedure in *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 8 L.R.R.M. 425 (1941) and in *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137, 76 L.R.R.M. 2497 (1971). But in each of those cases the respondent was *granted* a hearing in the representation case proceeding on the issue later raised in the unfair labor practice proceeding. As this Court points out in *Magnesium*, Congress in 1959 added section 3 (b) of the Act, which permits the regional director "to investigate and provide for hearings, and determine whether a question of representation exists. . ." In *Magnesium* the regional director held a hearing on the representation matter and made certain findings; this Court held that the employer was not entitled to a plenary review of those findings. In the instant case, Decoto's representation matter did not involve a hearing under section 3 (b) of the Act. Decoto signed the Board's "Stipulation For Certification Upon Consent Election," thereby making that stipulation, not section 3 (b), determinative in the resolution of objections to an election.

Due process may not require a hearing on issues of fact in both the representation case and in the unfair labor practice case. However, Decoto contends that due process requires a hearing on substantial issues of fact in either the representation case or the unfair labor practice case, unless a respondent has clearly waived any right to

a hearing. See *N.L.R.B. v. Bata Shoe Company, Inc.*, 377 F.2d 821 (4th Cir. 1967), cert. den. 389 U.S. 917 (1967), and *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109 (8th Cir. 1972), opinion modified, 455 F.2d 109.

This Court, in *N.L.R.B. v. Indiana & Michigan Electric Co.*, 318 U.S. 9 (1943), stated:

> The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed.

Decoto, the Union, and the regional director signed a Stipulation for Certification Upon Consent Election Agreement. Section 9 (c) (4) of the Act permits such a stipulation "in conformity with regulations and rules of decision of the Board." The three-party agreement stipulates to findings on objections to the election by the Board, not by the regional director, under the Board's Rules and Regulations.

The Board's Rules and Regulations, sections 102.62 (b) and 102.69 (c), provide that for elections conducted pursuant to a stipulation agreement, as Decoto signed, should there be any objections, the *Board* will make the determination. This procedure differs from that provided in the usual consent election agreement, which permits the regional director to make the determination. It also differs from the situation where there is no agreement for an election, but the Board, or the regional director by delegation under section 3 (b) of the Act, makes the determination, as in *Magnesium, supra*.

Another Court of Appeals has held that the stipulation for certification constitutes a contract between the employer, the union, and the regional director, which cannot be violated by the Board. *Tidewater Oil Company v. N.L.R.B.*, 358 F.2d 363 (2nd Cir. 1966).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX INDEX

Appendix A	Board's Decision in Representation Matter
Appendix B	Board's Decision in Unfair Labor Practice, 209 N.L.R.B. No. 149
Appendix C	Decision of Court of Appeals for the Ninth Circuit
Appendix D	Fifth amendment to U.S. Constitution; Statute; Rules and Regulations of the Board
Appendix E	Regional Director's Report on Objections to Election
Appendix F	Exceptions to Regional Director's Report on Objections to Election

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74-1561

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APPENDIX TO
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APPENDIX INDEX

		Page
Appendix A	Board's Decision in Representation Matter	1
Appendix B	Board's Decision in Unfair Labor Practice, 209 N.L.R.B. No. 149	6
Appendix C	Decision of Court of Appeals for the Ninth Circuit	21
Appendix D	Fifth amendment to U.S. Constitution; Statute; Rules and Regulations of the Board	31
Appendix E	Regional Director's Report on Objections to Election	43
Appendix F	Exceptions to Regional Director's Report on Objections to Election	71

APPENDIX "A"

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DECOTO AIRCRAFT, INC.

Employer

and Case 19-RC-6371

LOCAL LODGE 1531 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF SECOND ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election approved November 9, 1972, an election was conducted on November 20, 1972, under the direction and supervisor of the Regional Director for Region 19, among employees in the appropriate unit. At the conclusion of the counting of the ballots, the parties were furnished with a tally of ballots which showed that, of approximately 97 eligible voters, 95 cast ballots, of which 45 were cast for and 49 were cast against the Petitioner, and 1 ballot was challenged. The challenged ballot was insufficient in number to affect the results of the election.

Thereafter, the Petitioner filed timely objections to the election.

In accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Regional Director conducted an investigation and on March 30, 1973, issued and duly served upon the parties his Report on Objections to Election, in which he recommended that Objections 1 and 2 be dismissed and Objection 3 be sustained. Having found merit in Objection 3 and having found that the Employer also interfered with the election by other conduct not specifically described in the Objections, the Regional Director recommended that the election be set aside and that a second election be directed. Thereafter the Employer filed timely exceptions to the Regional Director's Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its power in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to

represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of the employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The parties agree, and we find, that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Employer's Yakima, Washington operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

5. The Board has considered the entire record in this case, including the Regional Director's Report and the Employer's exceptions thereto and supporting brief and finds no merit in the Employer's exceptions.[1/] Accordingly, the Board hereby adopts the findings and recommendations of the Regional Director and directs that the election be set aside and a new election be held.

1/ In the absence of exceptions thereto, the Board adopts *pro forma the* Regional Director's recommendation that Objections 1 and 2 be dismissed. The Employer's request for a hearing is hereby denied because the Employer, having received reasonable notice of specific conduct alleged to have interfered with the election, refused to present any evidence rebutting these allegations to the Regional Director.

ORDER

IT IS HEREBY ORDERED that the election held on November 20, 1972, in Case 19-RC-6371 be, and it hereby is, set aside.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director for Region 19 deems appropriate. The Regional Director shall direct and supervise the election, subject to National Labor Relations Board Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date of issuance of Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees

engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[2/] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Local Lodge 1531, International Association of Machinists and Aerospace Workers, AFL-CIO.

Dated, Washington, D.C., June 14, 1973.

(SEAL) NATIONAL LABOR RELATIONS BOARD

Edward B. Miller, Chairman

John H. Fanning, Member

John A. Penello, Member

2/ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 19 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

APPENDIX "B"

MFP

209 NLRB NO. 149

D--8509
Yakima, Wash.

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

DECOTO AIRCRAFT, INC.

and

LOCAL LODGE 1531, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

DECISION AND ORDER

Upon a charge filed on October 9, 1973, by Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, herein called the Union, and duly served on Decoto Aircraft, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 19, issued a complaint on October 17, 1973, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a) (5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 23, 1973, following a Board election in Case 19--RC--6371 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1/] and that, commencing on or about October 1, 1973, and at all times thereafter, Respondent has refused and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Thereafter, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On November 5, 1973, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on November 12, 1973, the Board issued an order transferring the proceedings to the Board

---

1/ Official notice is taken of the rerord in the representation proceeding, Case 19--RC--6371, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co., v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 379 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. On November 15 and 28, 1973, respectively, Respondent filed a response, with attached affidavits and documents entitled "Answer to the Motion to Transfer Case to the Board and for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and its response to the Motion for Summary Judgment with attached affidavits, the Respondent contends that the certification of the Union in the underlying representation case was improper inasmuch as the Board erred in setting aside a first election conducted herein, which the Union lost.

Our review of the record herein indicates that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on November 20, 1972, in which 45 eligible voters cast ballots for, and 49 against, the Union, and 1 ballot was challenged. The Union timely filed three objections alleging in substance that, by the

following and other acts and conduct, Respondent interfered with the election's laboratory conditions in order to undermine the Union: (1) the Respondent granted wage increases subsequent to the filing of the representation petition; (2) it cut back employees' work hours; and (3) it threatened an employee union adherent with shift change. After conducting an investigation, the Regional Director, on March 30, 1973, issued his Report on Objections to Election in which he found no merit in Objections 1 and 2, found merit in the third objection, and also found objectionable certain other conduct of the Respondent. Accordingly, he recommended that the election be set aside.

In his report, the Regional Director noted that his investigation had revealed evidence of other conduct not specifically alleged in the Union's objections and that he advised the Respondent that he intended to consider and weigh the testimony, but the Respondent objected to going into matters other than those specifically alleged in the objections and refused to offer evidence in rebuttal thereof. Accordingly, he considered the other evidence upon which he made five additional findings in which he found that the Respondent had coercively interrogated employees, solicited grievances, and promised benefits. While conceding that the threat to transfer and the transfer of the union adherent, who acted as the Union's observer,

alone did not constitute interference with the election, the Regional Director concluded that Objection 3, in conjunction with the additional findings, was sufficient to warrant setting aside the election.

The Respondent filed with the Board timely exceptions to the Regional Director's report. With respect to Objection 3, it asserted that the union observer had been transferred for reasons unrelated to the Union. With respect to the additional conduct not specifically encompassed in the objections, it contended that it was prejudiced by lack of notice thereof, renewed a contention concerning conduct occurring on the date the petition was filed, disputed the Regional Director's conclusions, and requested a hearing. However, on June 14, 1973, the Board issued its Decision and Direction of Second Election, in which it found the Respondent's exceptions without merit, and denied its request for a hearing on the grounds that, having received reasonable notice of specific conduct alleged to have interfered with the election, Respondent nevertheless refused to present any evidence to the Regional Director rebutting those allegations. Accordingly, the Board adopted the findings and recommendations of the Regional Director, set aside the election, and directed a second election. In the second election, which was conducted on August 15, 1973, 54 ballots were cast for, and 52 against, the Union. No objections were filed and, on

August 23, 1973, the Regional Director certified the Union.

Respondent's response to the Motion for Summary Judgment is essentially a renewal of the foregoing contentions and assertions, except that it now supports some of its assertions with affidavits which are not alleged to be, and are not, newly discovered evidence. It is clear that Respondent is now attempting to relitigate issues which were decided adversely to it in the underlying representation proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[2/]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation pro-

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2/ See *Pittsburgh Plate Glass Co. v. N.L.R.B*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

ceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent, Decoto Aircraft, Inc., is a State of Washington corporation engaged in the manufacture and sales of hydraulic, pneumatic, and mechanical control equipment at Yakima, Washington. During the past calendar year, a representative period, Respondent made sales in excess of $50,000 directly to customers located outside the State of Washington.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. THE REPRESENTATION PROCEEDING

1. The Unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

2. The certification

On August 15, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 19, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on August 23, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. THE REQUEST TO BARGAIN AND RESPONDENT'S REFUSAL

Commencing on or about September 21, 1973, and at all times thereafter, in anticipation of collective bargaining, the Union has requested Respondent to submit certain information concerning the employees in the bargaining

unit relevant to the negotiation of a collective-bargaining agreement, including, but not limited to, names, job classifications and descriptions, "fringe benefits," rest periods, and shop rules (herein collectively called the information), and has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 1, 1973, and at all times thereafter, Respondent refused to supply the information on the ground that it did not recognize the Union as bargaining agent of the employees in the bargaining unit, and has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 1, 1973, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that by such refusal, Respondent has engaged in and is engaging in unfair labor practices with the meaning of Section 8(a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III. above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, provide the requested and other necessary and relevant information and bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Decoto Aircraft, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees,, professional employees, salesmen, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 23, 1973, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 1, 1973, and at all times thereafter, to provide information necessary and relevant for intelligent collective bargaining and to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Decoto Aircraft, Inc., Yakima, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to provide information necessary and relevant for intelligent collective bargaining and to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees at the

Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employee, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Yakima, Washington, operations, copies of the attached notice marked "Appendix."[3/] Copies of said notice, on forms provided by the Regional Director for

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3/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., April 3, 1974.

Edward B. Miller, Chairman

John H. Fanning, Member

John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and

conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL--CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

DECOTO AIRCRAFT, INC.

(Employer)

Dated..... By.....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor Republic Building, 1511 Third Avenue, Seattle, Washington 98101, Telephone 206-442-4532.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. DECOTO AIRCRAFT, INC., *Respondent*) OPINION) No. 74-2021

On Application for Enforcement of an Order of the National Labor Relations Board

Before: CHOY and GOODWIN, Circuit Judges, and BURNS,* District Judge.

GOODWIN, Circuit Judge:

In this proceeding to enforce an order of the National Labor Relations Board, the employer, Decoto Aircraft, challenges the legality of a second representation election which the board had ordered after the union lost the first election. We enforce the board's order.

Decoto Aircraft manufactures and sells aircraft control equipment. Local Lodge 1531, International Association of Machinists and Aerospace Workers, AFL-CIO had been trying to organize Decoto's Yakima plant. On No-

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*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

vember 20, 1972, the Seattle Regional Director of the National Labor Relations Board conducted a representation election, and the union did not obtain enough votes to win recognition.

The union filed a timely protest, asserting that Decoto had interfered with laboratory election conditions[1] and requesting that the election be set aside and a new one be ordered. In due course a new election was ordered, and the union won.

During the Regional Director's investigation of the union's charges, he notified Decoto that evidence of employer misconduct not specifically alleged by the union had been discovered, and that he intended to consider and weigh this evidence. On advice of counsel, Decoto objected to the Regional Director's inquiry into matters not specifically charged by the union. Decoto offered no evidence to rebut the Regional Director's additional evidence of misconduct, but stood on the defense that these "new" matters had not been covered by the charges.

In March 1973, the Regional Director issued his report on the union's objections to the first election. He concluded that the union's wage and hour claims were not meritorious. However, the claim based upon an alleged threat by Decoto to change the shift of a prounion employee, combined with five additional findings[2] (herein

called "additional findings") not specifically charged by the union, created a sufficient basis for setting aside the election.

Decoto promptly filed exceptions to the Regional Director's report. While Decoto asserted that the report was defective because new allegations and evidence were improperly considered by the Regional Director, Decoto also asserted that it was entitled to a hearing.

The NLRB, in its "Decision and Direction of Second Election" found no merit in Decoto's exceptions. The board denied the requested hearing "because the employer, having received reasonable notice of specific conduct alleged to have interfered with the election, refused to present any evidence rebutting those allegations to the Regional Director."

Following NLRB certification of Local 1531 as the unit's agent, Decoto refused to supply the union with requested bargaining information and refused to recognize and bargain with the local. Proceedings under sections 8(a) (1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a) (1) and (5), ensued.

Decoto admits its refusal to bargain, but challenges both the second election and the board's proceedings leading to the second election.

On April 3, 1974, the board issued its decision and or-

der, requiring Decoto to provide the union with pertinent bargaining information; to bargain with the union, and to cease interfering with the unit employees' § 7 (29 U.S.C. § 157) rights.

In this proceeding to enforce the order we consider:

(1) Whether the Regional Director has authority to make additional findings and recommendations based on evidence of election interference uncovered during the investigation of an election but not otherwise related to the union's specific objections.

(2) Whether Decoto's refusal, during the Regional Director's investigation, to present evidence on allegations other than the union's specified objections precludes Decoto from later claiming that it is entitled to a hearing to resolve substantial and material issues of fact allegedly surrounding those allegations.

(3) Whether the cumulative effect of the shift-change charge and the additional findings was sufficient to warrant setting aside the initial elction.

Decoto's assertion that the Regional Director's investigation should have been limited to the formal objections contained in the union's protest is not well taken. In reviewing Decoto's preelection conduct, the Regional Director was free to consider all evidence, relevant to the election, which was uncovered by the investigation. *In-*

dependent, Inc. v. N.L.R.B., 406 F.2d 203, 206-207 (5th Cir. 1969). The Regional Director properly included the additional findings in his assessment of the climate surrounding the election.

Regarding Decoto's demand for a hearing, when the Regional Director investigates the circumstances of a challenged election, " ° ° ° if it appears ° ° ° that substantial and material factual issues exist which, in the exercise of his reasonable discretion, ° ° ° may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing ° ° ° ." 29 C.F.R. § 102.69(d) (1973).

The burden was on Decoto to tender specific substantial and material factual issues to be resolved by a hearing. See *N.L.R.B. v. White Knight Manufacturing Company*, 474 F.2d 1064, 1068 (5th Cir. 1973). Sufficient "evidence" to warrant a hearing need not satisfy technical evidentiary requirements, and is not insufficient merely because it is not attested to, verified, or in affidavit form. See *Henderson Trumbull Supply Corp. v. N.L.R.B.*, 501 F.2d 1224 1227-1228 (2d Cir. 1974). But something more solid than a mere conclusory statement is needed.

Decoto had an opportunity to submit evidence rebutting the Regional Director's additional findings, but refused to do so. Decoto thus failed to meet its burden of

showing that substantial and material factual issues existed. The board did not err in its June 14, 1973, decision refusing to grant Decoto's request for a hearing. *See* 29 C.F.R. § 102.69(d) (1973); *White Manufacturing Company, supra*... The board clearly had authority to order the second election.

Decoto's response to the board's summary-judgment-show-cause notice again requested a hearing, but we agree with the board's statement in its decision granting summary judgment that "[i]t is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. (Footnote omitted)" Decoto has not offered newly discovered or previously unavailable evidence. *Cf. Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U.S. 146, 162 (1941); 29 C.F.R. § 102.67(f) (1973).

We are satisfied that the cumulative effect of the facts including those uncovered in the Regional Director's investigation warranted setting aside the initial election. These charges remained uncontradicted. Decoto's tactical choice to stand "on the pleadings" left the proceedings in the posture of a default.

None of Decoto's allegedly unlawful acts, alone, was of a nature so coercive, egregious, or inherently detrimental to laboratory conditions as to justify setting aside the first election.[3] However, the board had the right to consider the totality of Decoto's conduct in the relevant preelection period. The board was free to conclude that the conduct represents a systematic pattern of activity tending to upset the laboratory conditions requisite to a valid election. *See also, N.L.R.B. v. Shirlington Supermarket, Inc.*, 224 F.2d 649, 653 (4th Cir. 1955), where the court said:

> "• • • The soundness of the Board's judgment would seem to be demonstrated by the fact that the result of the election was different when the practices which the Board regarded as prejudical were not engaged in. Certainly, we would not be justified in setting aside its action as an abuse of discretion in the light of the circumstances before us."

The quoted observation applies with equal force here.

The board will draft and submit an appropriate form of judgment in this court.

FOOTNOTES:

[1] Specific conduct alleged to have interfered with laboratory conditions is:

1. Decoto's grant of wage increases subsequent to Aerospace's filing of the petition for election.

2. Decoto's reduction of employee work hours (from ten hours to eight hours a day) during the week of the election.

3. Decoto's threat of an undesirable shift change to an employee who was a union supporter.

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[2] The Regional Director alleged the following to constitute conduct detrimental to laboratory conditions:

1. Decoto's coercive interrogation of unit employees regarding protected union activities.

2. The substance of employer remarks to assembled unit employees, including means of registering employee complaints, the reestablishment of shop committees, employee accessibility to management, pension funds, and working conditions.

3. Employer's implied promises of future employee pension benefits.

4. Employer remarks to employees in an employee meeting, including further discussion of pension benefits and improved methods of employee-grievance resolution.

5. The circumstances surrounding the preelection circulation of a new employee handbook, which

contained implied promises of future employee benefits.

[3] Decoto cites *NLRB v. Tommy's Spanish Foods, Inc.*, 463 F.2d 116 (9th Cir. 1972), for the proposition that "[e]ven if the employer had information employees [during the critical preelection period] of the fact that prior to the filing of the election petition the employer had investigated pension funds, this statement would not be grounds for setting aside the election."

We agree with Decoto's analysis of *Tommy's Spanish Foods*, but distinguish it from the case at bar. We do not base our holding solely upon the fact that Decoto informed its employees of a potential increase in pension benefits. Rather, it is based upon the totality of Decoto's conduct including, but not limited to, the pension benefit issue.

FILED
MAY 7, 1975
EMIL E. MELEI, JR., Clerk
U. S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner,)No. 74-2021
)
)
v.)
) ORDER
DECOTO AIRCRAFT, INC.,)
)
)
Respondent.)

Before: CHOY and GOODWIN, Circuit Judges.

Upon due consideration, respondent's Motion To Recall Mandate of the Court and To File Late Application for Rehearing En Banc is

DENIED.

APPENDIX "D"

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

RIGHTS OF ACCUSED IN CRIMINAL PROCEEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NATIONAL LABOR RELATIONS ACT, As Amended
(29 U.S.C. Secs. 141 et. seq.)
RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any

or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-

bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board

for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the

United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall be alleged a violation of section 8(a) (1) or section 8(a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or interna-

tional in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit

or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such ad-

ditional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

RULES AND REGULATIONS OF THE N.L.R.B.

§ 102.62 Consent-election agreements—(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such

agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such consent election shall be consistent with the method followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time

and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to sections 102.69 and 102.70.

102.69 (c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the results of section 102.69(d), investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.69(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C., with copies of such request served on the parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, with sup-

porting brief, if desired, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be excepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof together with a copy of any brief filed on the other parties and shall file copies with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further period as the Board may allow, a party opposing the excptions may file an answering brief with the Board in Washington, D.C.; except that if personal service of the exceptions and any supporting brief is made upon the Board, 10 days will be allowed. However, 3 days as provided in § 102.114 will not be added to the prescribed time for filing an answering brief. Such brief shall be submitted in eight copies, printed or otherwise legibly duplicated, except that carbon copies shall not be filed and if submitted will not be accepted. Immediately upon the filing of such brief, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultanously with the filing of the answering brief. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions,

may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under § 102.67, the regional director may (1) issue a report on objections or challenge ballots, or both, as in the case of a consent election pursuant to subsection (b) of this section, or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

APPENDIX "E"

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 19

DECOTO AIRCRAFT, INC.
Employer

and Case No. 19-RC-6371

LOCAL LODGE 1531, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Petitioner

REPORT ON OBJECTIONS TO ELECTION

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director on November 9, 1972, an election was conducted on November 20, 1972 in the following described bargaining unit:

> All production and maintenance employees at the Employer's Yakima, Washington operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

The offficial tally of ballots served upon the parties on November 20, 1972 set forth the following results:

Approximate number of eligible voters	97
Void ballots	0

Votes cast for the Petitioner	45
Votes cast against participating labor organization	49
Valid votes counted	94
Challenged ballots	1
Valid votes counted plus challenged ballots	95

The challenged ballot was insufficient in number to affect the results of the election.

On November 28, 1972[1/] the Petitioner filed timely objections to the election, a copy of which was duly served upon the Employer.

Pursuant to paragraph 6 of the Stipulation for Certification Upon Consent Election and Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has investigated the objections and hereby reports as follows:

The objections of the Petitioner may be summarized as follows:

1. The Employer granted wage increases subsequent to the filing of the petition.
2. The Employer cut the employees' work hours from a ten-hour day to an eight-hour day during the week of the scheduled election.
3. The Employer threatened an employee union supporter with shift change.

By these acts and conduct and other acts and conduct, the . . . Employer interfered with the laboratory conditions criteria in order to undermine the petitioning Union.

1/ All dates indicated herein are 1972 unless otherwise stated.

OBJECTION NO. 1

The investigation discloses that between the petition filing date and the election, thirteen (13) raises were given to unit employees; twelve (12) as of November 9 and one on November 16. In each case the raises were from one labor grade to the next higher in the respective departmental groups.

The Employer has had in use for about ten (10) years an "Employee Handbook," which is periodically revised, updated, and conformed to internal Employer changes of practice. The handbook defines the internal wage review and promotion policies of the Employer for the departmental groups involved. Quoted below are pertinent excerpts from that handbook:

> Employees are classified into eleven groups according to job assignments. These groups are further divided into two or more classes based upon responsibility, average experience, and overall efficiency. . . .
>
> . . .
>
> Progress reviews will be made every three months untill a person reaches pay grade 9. The review period extends to every four months above pay grade 9. Review automatically stops when an employee reaches Class A in his group. When a Class A employee is transferred to a higher pay group, the reviews are automatically restarted.

The Employer asserts that each employee has a master record sheet which is reviewed by the vice-president of manufacturing every month. When an employee is eligible for review, the Employer prepares a rate review data sheet and routes it to the appropriate supervisor who conducts a review during the last 2 weeks of the month to permit increases to become effective within the first 2 weeks of the following month.

With the exception of one employee, the granting of raises and of labor grade promotions follows the procedures outlined in the handbook. The exception involves an employee, who in May of 1972, was promoted to a "set-up man" in group 2, which includes specialists for turret lathes, engine lathes, milling machines, and tool and cutter grinders. This employee had been a labor grade 14, as high as is possible in that group for a specialist. The set-up grade is 14½. This employee was raised to the 14½ grade on or about June 1.

On page 26 of the handbook, dated March 9, 1972, the fourth paragraph reads:

> The pay grade for a set up man is 14½ for 3 months, then he advances to 15.

Notwithstanding the explicit language in the handbook, this employee was not evaluated until October 30 or raised until November 9, roughly fifty-seven (57) days late.

However, the investigation found no evidence that the

"late" raise of this employee was improperly motivated. And as already stated, the other raises followed the established policy of the Employer.

With respect to the granting or withholding of benefits, the Board in *The Great Atlantic & Pacific Tea Company, Inc.*, 166 NLRB 27, stated:

> As a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as he would if a union were not in the picture. On the other hand, if an employer's course of action is prompted by the union's presence, then the employer violates the Act whether he confers the benefits or withholds them because of the union.

Accordingly, I find no merit in Objection No. 1 and I recommend its dismissal.

OBJECTION NO. 2

The investigation discloses that the number of overtime hours was cut back just before the election. Many employees had been working a standard ten (10) hour day - - and some up to twelve (12) hours per day - - plus an eight (8) hour day Saturdays.

High hours of overtime with the Employer appear to be a condition imposed by the nature of the aircraft industry. That is, because the Employer supplies parts for and is dependent upon the aircraft industry, it must react to the business fluctuations of the industry as a whole. As

an example of this, the Employer during September 1968 employed approximately 180 people, and during September 1971 about 75, and at the time of the election the number of employees had risen to about 130.

Accompanying the rise in employment is a backlog in work and a shortage of man hours available to perform the work load. Projections are made by the Employer correlating these two indices. One such projection for the months of October 1972 through April 1973 shows a steady decline in man hour shortages from 10,274 in October to a surplus of 13,631 in April 1973. A later projection, December 1972 through June 1973, shows an average shortage of 17,000 man hours.

Beginning with the payroll week ending October 25, the overtime hours rose to over 1,000, which along with almost 4,500 regular time hours set a record for calendar 1972. Previous highs in 1972 had been in the range of 700 to 800 overtime hours combined with about 4,000 to 4,200 regular hours.

The overtime and regular hours worked were as follows for the last quarter of 1972:

week ending [2/]		regular hours	overtime hours	total
October	4	4,252	781	5,033
October	11	4,268	807	5,075
October	18	4,430	581	5,011
October	25	4,492	1,091	5,583
November	1	4,318	1,263	5,581
November	8	4,372	1,216	5,588
November	15	4,440	1,131	5,571
November	22	4,476	265	4,741
November	29	4,429	303	4,732
December	6	4,535	1,002	5,537
December	13	4,567	896	5,463
December	20	4,680	1,080	5,760
December	27	4,604	271	4,875

For accounting purposes, during the payroll week ending November 22, employees worked Saturday, November 18 at regular hours in lieu of Friday, November 24, the day after the Thanksgiving holiday. This eliminated the 18th as an overtime day, which explains some of the drop from 1,131 to 265 as the amount of overtime worked.[3/] During the following payroll week, that ending November 29, which included Thanksgiving, a regularly paid holiday, no

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2/ The payroll weeks are from Thursday through Wednesday of the following calendar week.

3/ For example, if all of the unit employees, numbering approximately ninety-seven (97) worked Saturday, November 18 for a full eight (8) hours, it would account for 776 hours lost for overtime work, or nearly all of the drop.

overtime was worked on November 23, 24, or 25 due to the plant's being shutdown for a 4-day weekend. However, regular hours are reflected for the 5 regular work days of the week. Thereafter and throughout December until the payroll week including Christmas, the overtime hours are again high.

With respect to a decision having been made regarding the overtime to be worked, the evidence is not clear. Certain employees state they were told by their foremen (supervisors) that during the calendar weeks before and of the election (on November 20) that they would only work an eight (8) hour day. Employer officials deny such specific decisions were made, but that they were concerned about the high number of overtime hours worked and consciously sought to decrease them. No specific criteria were used to base the decisions that might have been made regarding the number of overtime hours worked other than they had been working a lot of it and it was felt the employees were tired. In line with this, the Employer states it was having some difficulty getting volunteers for overtime.

Notwithstanding the ambiguity that exists about the cutback, other than the element of timing, no evidence was found that the cutback in overtime hours was discriminatorily motivated. The Saturday work and the Thanksgiving holiday appear to account in large measure to the loss

of hours. Also, it is difficult to find that a cutback in hours to a standard 40-hour week is a denial of benefit when the cutback was indiscriminately applied and considering that employees had been working exceptionally long hours theretofore.

Therefore, I find no merit in Objection No. 2 and recommend that it be dismissed.

OBJECTION NO. 3

The investigation discloses that the one employee referred to in this objection had been working dayshift on the automatic machines as a set-up man since on or about February 15, 1972 and was transferred to the milling section on November 20, the day of the election. There is some variance as to testimony regarding the circumstances of the initial transfer during February 1972. That is, according to the Employer and the notation on the "Employee Transfer" form, dated February 15, the transfer took place with the understanding that the employee would have to "fill in on (the) second shift as a set-up man if the need arises."

Contrarily, the employee in question testifies that he took the transfer with the explicit condition that he not be required to switch back to the nightshift. The employee acknowledges, however, that his condition was not specifically accepted, but rather that the plant superintendent convin-

ced him to accept the job on the basis that "we will see how things work out."

On or about November 16, the Employer by its vice-president of manufacturing, proposed to the employee in question that he go on the nightshift. The employee states the Employer made clear that his agreement to go on the nightshift would mean it would be permanent, that is, "for ever and ever." The Employer states it may have said to him that if he had to make a decision he should consider it in the light of "for ever and ever."

The alleged threat as to the consequences of not accepting the shift change is that the Employer stated that if he didn't agree to go on nights " . . . you know what the company is going to do - - do you know what the company is going to have to do?" The Employer states it " . . . may have said that if he didn't agree to go on nights that we'd have to make some changes."

The employee stated that he would talk the matter over with his wife which he did. Soon thereafter the employee reported to the plant superintendent that he would not agree to go on nights and inquired what was going to happen to him as a consequence. The employee requested that if he were to be moved he preferred the milling machines on days. Subsequently, the employee sought an answer to thatquestion from the Employer's president, but

nothing was communicated at that time.

At the start of the shift on November 20 - - when the nightshift employee began on days - - the employee in question was instructed to go to the mill section. The employee states that at about 9 a.m. the plant superintendent called him into his office and told him about the transfer and that he would take a cut in pay. It is also alleged that at that meeting, the plant superintendent stated, among other things, " . . . that the company was surprised and disappointed in my attitude towards the Union."

The Employer denies having made such a remark and does not recall whether in fact he called the employee in and spoke to him at all on that date.

The employee in question was the Union's observer at the election held later in the day on November 20, and had been an active supporter of the Union from the initial stages of the organizing drive. /4

The Employer states that the need arose to switch employees as to shifts because two automatic machine set-up men on nightshift requested and deserved to be switched to days. Each, according to the Employer, had family prob-

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4/ Subsequent to the election and on December 1, the employee was informed and initiated a "Rate Review Data" form indicating he was reduced one labor grade to the top rate in the group 2 specialist classification.

lems necessitating the switch to days; one lost his wife and had children to look after and the other had an ailing wife requiring care. The most senior of the two and the one with the highest labor grade and the longest time on nights was switched to days on election day, November 20. The other was kept on nights.

Based upon the bare facts of this transfer alone, where the initial transfer and promotion was predictated upon the possibility of going on nightshift and evidence that the employee in question was replaced by another with more seniority and considerable time on nightshift, it does not rise to the an act of interference with the election. Were the transfer to be considered outside of the context of other conduct found during the investigation, I would recommend its dismissal.

However, several matters at least in part related to the transfer must be considered which also might have been specifically objected to. Even though these other matters were not specifically objected to, the Regional Director is not constrained from considering other conduct found during the course of the investigation which may reasonably be inferred to have interfered with the election processes of the Board. *Sprague Ponce Company,* 181 NLRB 281 and cases cited therein; also *International Shoe Company,* 123 NLRB 682 and the line of cases following.

OTHER EVIDENCE TO BE CONSIDERED

During the interviewing of an Employer witness on January 18, 1973, some of these other matters alleged by employed witnesses were raised. The Employer representative objected to the line of questioning on the basis that it was not objected to, nor did the Employer have notice of the allegations.

On February 12, 1973 the Regional Director by its agent, specified the allegations for which an answer was sought. These matters were as follows and will hereinafter be referred to as additional findings 1 through 5.

1. Alleged acts of interrogation by Employer supervisors of unit employees on or about October 24 and 26 about protected activities.
2. The substance of remarks made by the vice-president of manufacturing to assembled employees for the nightshift on or about October 25 and the dayshift on October 26. In line with those meetings, the Regional Director sought information regarding its course of action following the meeting as a result of the employee-Employer interchange.
3. Alleged Employer promises of benefits to employees following a management meeting on or about November 2.
4. The substance of remarks allegedly made by the Employer's president at a meeting with employees on or about November 16 regarding the implied promise of benefit and methods of resolving employee grievances.

5. The circumstances surrounding the distribution of a new employee handbook to employees before the November 16 all-employee meeting.

The Employer, on February 13, 1973, was cited to Board authority allowing the Regional Director to consider conduct other than that specifically objected to and put on notice that if unrebutted the Regional Director would weigh the uncontroverted testimony citing specifically *Sprague Ponce Company, supra.*

The Employer on February 14, 1973 reaffirmed its prior position objecting to going into matters other than specifically objected to and stated that in addition that no conduct of the Employer would constitute grounds for setting aside the election.

ADDITIONAL FINDING NO. 1

A meeting between employees and Union officials was held on Sunday, October 22, at which union authorization cards were signed. On October 24, the date the petition was filed, the plant superintendent, along with the vice-president of manufacturing, who did the speaking, talked with an employee at his machine.[5/] The Employer questioned the employee as to the who and why of the organizing. The employee was asked as to whether an outside

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5/ This is an employee not heretofore involved in the Union-filed objections.

organizer (named by the Employer) was trying to take Decoto's business away from him. The Employer advised the employee that it wanted to know what is going on and where the organization effort was coming from. The employee was then questioned about his attendance at the Union's October 22 meeting and was asked to find out what he could about the organizing. He was told that the Employer would get back to him in the morning. The following morning the vice-president asked the employee what he had found out about the problem, to which the employee responded that he, the employee, did not have a problem.

The Board has held that interrogation which seeks to ascertain an employee's union sympathies and which places an employee in the postition of acting as an informer regarding the union activities of his fellow employees, is coercive. *Ingress-Plastene, Inc.*, 177 NLRB 481; *General Automation Manufacturing, Incorporated*, 167 NLRB 502; and *Abex Corporation-Engineered Products Division*, 162 NLRB 328.

ADDITIONAL FINDING NO. 2

On October 25 at about 7 p.m., the vice-president of manufacturing called a meeting of nightshift employees for the "new building lunchroom." Prior to this meeting and the one the next day for dayshift employees, the Em-

ployer sought information from various employees about what had compelled the employees to seek union representation - - a line of inquiry continued in the mass meetings. Both meetings were similar and lasted several hours. The vice-president made some initial remarks and then engaged in a dialogue with employees. The vice-president stated at the beginning of the meeting that he wanted his say and asked why the employees wanted a union, what the problems were, and what the employees felt they had to gain from union representation. In short the vice-president gave an account of the past bargaining history of the Employer and the failure and hardships of union representation. He gave a personal account of his rise through the ranks to his current position. He related the business operations of the Employer to the aircraft industry and that while there had been layoffs during the recent recession in the industry, business was on the upswing and if it continued the same, things would get better in the future. The employees were asked not to judge the Employer by the past.

During the course of employee statements and questions, which the vice-president solicited and answered, several significant matters were discussed. One was a means by which employees could register complaints. The past shop committee, then inactive, was discussed. The vice president stated the old committee had been disband-

ed because of too much red tape and pettiness. The vice-president stated that he felt it was a good idea that the shop committee ought to be reactivated and that it might solve a lot of employee problems.

The vice-president acknowledged that there had been a communication gap between employees and management and that if employees had voiced their grievances earlier that perhaps something could have been done about them. He stated that it was true that management had been very busy and inaccessible in the recent past, but that he would try to be more accessible in the future and that his door would always be open. Moreover, he stated that he would begin going through the shop to see and discuss what the problems were.

Another matter discussed, which was an apparently important one to employees and will be a subject discussed below, was a pension or retirement plan for unit employees. The vice-president told employees that he would discuss such a plan with the president. He also told the employees that the president had looked into such a plan, but that it was too expensive at the time. He stated that the president still had a plan in mind and that this was coming about without the Union. And that furthermore if business continued to grow, it was possible to have a plan in a year or two. In line with the business outlook regular cost of living raises were mentioned also.

Employees also asked about and discussed a number of shop floor matters such as lighting, tools, noise levels, conditions of machines, methods of performing jobs, safety, wages and job rotation and progression. To various of these matters the vice-president offered advice as to how to cope or solve the problems and for others he said he would look into them and for others he said changes were in the works. Many of these "routine" shop floor matters are covered procedurally in the employee handbook. However, not all employees had a copy. The vice-president stated he would try to get the new employees a copy. It was also discussed that the edition of the handbook then in existence was out of date. The vice-president stated that it did need and was being rewritten, revised, and updated.

Following the meetings and during the course of the next week particularly, the vice-president circulated among the employees on both shifts and spoke with them concerning problems and how things were going. Evidence of this course of conduct by the vice-president, although not unknown in the past, indicates it was much more pervasive, systematic, and obvious to employees.

There is also evidence that other supervisors discussed matters brought up at the meetings with employees and asked employees what they had gotten out of the vice-president's meeting.

One matter the vice-president discussed with one of

the nightshift employees (and the one who was subsequently on November 20 transferred to dayshift in place of the to be Union observer) following his meeting was attempts this employee had made about getting off nights. This conversation took place during the week after the nightshift employee meeting on October 25. The employee stated he had been trying to get off nights for some time, had not theretofore received an answer and that he had given the superintendent a date certain to give him an answer. The vice-president advised the employee that he should give the superintendent time, but not to worry because something could be worked out. During the parting of the two the subject of the Union came up and the vice-president expressed his hopes that the Union would be voted down and that it was not going to do the Employer's place any good at all.

Thereafter, on November 13, after the date certain had passed, the employee, the vice-president, and superintendent met in the superintendent's office where the vice-president told the employee that by November 17 they would have an answer for him regarding the shift change. On November 17 at about 5 p.m., the vice-president instructed the employee to come in on days Monday and he would find something for him to do.

This employee had been employed by the Employer for more than 7 years and had worked nights with the ex-

ception of a 3-week period during November 1971. Before his eventual shift change beginning November 20, he had been trying for about a year and a half to get off nights.

The reasons the employee gave the vice-president for still wanting to get off nights were that due to the strain he had been under, he couldn't cope with or wasn't willing to accept the responsibilities associated with being an automatic machine set-up man on nights. That is, that on nights, contrary to days, the automatic machine set-up man is responsible for "tying in" with the just completed dayshift and performing other duties within the realm of the dayshift foreman for which he, working on nights, was not paid (nor under the circumstances, able or willing to perform).

Other evidence exists that indicates that situations of other employees, in addition to the one just discussed, were changed as a result of the vice-president's meetings and the expressing of employee grievances. It also appears clear that the type of meetings held by the vice-president are rare and when employee - Employer meetings have been held, they are for purposes such as solicitating United Good Neighbor contributions not employee grievances. 6/

6/ One employee recalls only one previous type meeting and that was when there was a previous attempt by the Union to organize the plant several years ago.

The Board has held that:

> [w]here, as here, an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns seeking to represent employees, we think there is a compelling inference that he is implicitly promising to correct those inequities he discovers. As a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary. (*Reliance Electric Company*, et al., 191 NLRB No. 1, citing *Raytheon Company*, 188 NLRB No. 42 slip. op. See also, *Flight Safety, Inc.*, 197 NLRB No. 40 slip. op.)

In the instant case there is more than the abstract solicitation of grievances and timing: 1)the suggestion and/or concurrence for the reformation of the shop committee; 2)suggestions given as to how to correct problems; 3) the implication of better things to come and better times ahead with respect to a pension plan and regular cost of living raises; 4) the realization of the theretofore inaccesibility of management for employee grievances and the promise that management's door would thereafter always be open; and 5) the promise of and thereafter the follow through of looking into employee problems.

Such a course of conduct falls within the proscriptions with regard to the solicitation of grievances outlined in the *Reliance Electric Company* line of cases, *supra*. While such conduct has been found to violate Section 8(a) (1)

of the Act, it is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1782.

ADDITIONAL FINDING NO. 3

Following a management meeting on November 2 and for several days thereafter, various foremen-supervisors spoke to employees regarding the substance of the management meeting. Testimony from employees indicate that among other matters discussed they were told by four supervisors that management had discussed the desirability, possibility, and timing of a pension plan for unit employees. The testimony goes as follows:

Employee number 1 states that his supervisor stated that management had been kicking around the idea of whether the employees would want a pension plan or a big raise the most.

Employee number 2 states that his supervisor in the presence of himself and two others (none of the five employees included herein) stated that the Employer had been looking into pension plans and had not previously found a plan that was satisfactory, but that finally he had found a plan he was going to seriously look into.

Employee number 3 states his supervisor said not to say anything, but the Employer was considering a pension

plan and it probably would not be long before the employees received it.

Employee number 4 states that the day before he had met with management officials and they talked about things that were brought up at the vice-president's meeting, the employee was informed that management had talked about a pension plan, looked into a plan in March 1972, but gave a raise instead. 7/

Employee number 5 states that his supervisor stated that he had been in a meeting the previous afternoon and that the Employer was considering a pension plan - - a plan where one could retain his contribution to it if and when he left the company - - and because of that the supervisor couldn't see any reason at all for the fellows in the shop being in favor of the Union.

In enforcing a Board order, the Court of Appeals for the Seventh Circuit stated:

> There is nothing violative of the Act in a Company's holding of meetings to determine employee grievances, so long as "the discussions avoided any attempt by the company to imply promises of benefits if the Union was defeated." [citing cases] . . . However . . . (a) violation is committed if the solicitation of employee

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7/ This employee states that two and possibly a third employee spoke to him about their supervisors mentioning the possibility of a pension plan to them. One of the two is covered as one of the five.

> grievances is "accompanied by an express or implied promise of benefits specifically aimed at interfering with, restraining, and coercing employees in their organizational effort." [citing cases] . . . *NLRB v. Tom Wood Pontiac, Inc..*, 447 F.2d 383, 384 (C.A. 7), 77 LRRM 2968, enfg. 179 NLRB 581.

When the implied promise of a pension plan benefit is viewed in the context of the vice-president's meeting with employees, the unmistakable impression is that this talk about a pension plan was calculated to dissuade employees from selecting union representation and therefore constituted an interference with the election.

ADDITIONAL FINDING NO. 4

On or about November 16, the Employer held a meeting for all unit employees overlapping the shift change. During the course of the meeting the Employer's president indicated that he was still considering a pension plan and that by next March (1973) he would have a more definite answer for the employees on the same. He contrasted the pension plan offered by the Union with those commercially available which he said were better. He stated that last March (1972) when an across-the-board raise was given to employees, that perhaps he should have asked employees what they would have preferred, the raise or a pension plan.

Additionally the president stated that he would like to see the lack of communications problem straightened out

and would like to see the shop committee set up again so that he could meet with it in hopes of solving some of the problems out in the shop. These remarks, while casual enough in themselves, portend to mean much more in the context of the employee grievances and desires and the course of conduct associated with the earlier meetings of the vice-president and afterwards. Therefore, these remarks by the president must be viewed in the light of the analysis discussed in the additional findings covered above.

ADDITIONAL FINDING NO. 5

On or about November 16, the Employer distributed a "new" employee handbook entitled, "Decoto Aircraft, Inc., Employee Reference Manual, 1972 Edition," The distribution occurred just before and during the meeting and the substance of the president's remarks in the meeting came from an explanation of the manual.

Comparing the 1972 edition with an earlier undated version (used at least in 1969) in pertinent part, page 10 on "Shop Committee," the following is the entire text:

> Our system is now inactive. Although effective in theory as an excellent means of two way communication, it proved to be impractical and too time consuming. Therefore, the employees as well as management lost interest and it was discontinued.
>
> Future planning includes adoption of a simplified system yet to be developed.

The old employee handbook contained detailed references

as to how the shop committee was to function to improve communication. In view of the obvious breakdown in the old shop committee concept, as well as the Employer's suggestion to employees in earlier conversations that the shop committee be reformed, it appears that the "new" employee handbook contains an implied promise of a future benefit. This employee handbook distribution, promising future fruition of a means to resolve employee grievances, in conjunction with the management discussions with employees referred to earlier, presents further evidence of the Employer's attempts to dissuade employees from supporting the Union by promising to cure the problems which one might infer caused the employees to seek union representation.

CONCLUSIONS

Having recommended that Objections Nos. 1 and 2 be overruled and dismissed and having considered Objection No. 3 in light of other evidence not specified in the three objections, I have treated the other evidence as Additional Findings Nos. 1 through 5.

This additional evidence has been considered because it relates to Objections No. 3 and it is within the Regional Director's authority to consider evidence other than that specifically alleged in the objections if during the course of the investigation it comes to light.

The Employer has objected to the increased scope of the investigation and after having been put on notice of Board authority and the allegations made, has reiterated its objection. Therefore, the evidence outlined in the additional findings has been considered and weighed uncontroverted by the Employer except that it states that its conduct did not interfere with the election.

I have found that the additional Findings Nos. 2, 3, 4 and 5, all relate to and are part of Objection No. 3 or can stand separately. Either position rests upon the analysis outlined above under the respectively numbered additional findings.

I have found that the Additional Findings No. 1, which predates the others, yet having taken place on October 24, the date the petition was filed, is likewise to be considered in making a recommendation as to the validity of the November 20, 1972 election. This finding is based upon the analysis outlined under Additional Finding No. 1 above.

RECOMMENDATION

Having concluded and recommended that Objections Nos. 1 and 2 be dismissed and that Objection No. 3, along with Additional Findings Nos. 2, 3, 4 and 5 be sustained, in addition to the Additional Findings No. 1, it is hereby recommended that the Board set aside the November 20,

1972 election and direct a second election.

As provided in Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, either party may, within 10 days from the date of issuance of this report, file with the Board in Washington, D.C., eight (8) copies of exceptions to such report with supporting brief if desired. A copy of such exceptions must be timely served upon the other party and upon the Regional Director for Region 19.

Dated at Seattle, Washington this 30th day of March 1973.

CHARLES M. HENDERSON

Charles M. Henderson, Regional Director
National Labor Relations Board, Region 19
1000 Republic Bldg., 1511 Third Avenue
Seattle, Washington 98101

APPENDIX "F"

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 19

DECOTO AIRCRAFT, INC. *Employer*	)	
and	)	CASE NO. 19-RC-6371
LOCAL LODGE 1531, INTERNATIONAL ASSOCIOTION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO *Petitioner*	)	Dated Apr. 6, 1973

EMPLOYER'S EXCEPTIONS TO REPORT ON OBJECTIONS TO ELECTION

Comes now the Employer, who makes the following statement concerning the Regional Director's Report on Objections to Election:

OBJECTION NO. 1

The Employer agrees with the finding of the Regional Director that the Employer for many years has had a practice of periodic wage review within a pay grade and that the Employer continued to follow that practice during the period relevant herein.

OBJECTION NO. 2

The Employer agrees with the findings of the Regional Director that any change in overtime hours worked during the week of the election, as well as in the weeks before or after the election, was caused solely by business reasons.

OBJECTION NO. 3

The Employer agrees in part with the findings of the Regional Director.

However, the report of the Regional Director omitted many of the statements made by management representatives to the field examiner.

The Employer witnesses provided detailed information to the field examiner to show that a man, Bob Hoeft, had much more seniority than the complaining employee, Bob Beer. Hoeft had considerable problems due to his being on the night shift. Hoeft's problems became known to management, a week or so prior to the election. Management was aghast at the problems which Bob Hoeft had faced due to his evening working hours. The Employer consulted the other automatic machine set-up men prior to making a decision. Management decided to make the only change possible among the automatic machine set-up men, namely, to permit Hoeft to come onto the day shift as he requested. This meant that the junior day shift man

qualified to set-up the machines would go onto the night shift. That man was Bob Beer.

Management discussed this change in shift with Beer but Beer objected to the change. Management at the time was not aware that Beer was a supporter of the union or that Beer would be the union's election observer. The management representatives who made the decision to transfer Beer did not know that he would be the union's election observer until shortly before the balloting.

The Employer witnesses denied making any statement as reported by the field examiner in page 7 as follows:

> It is also alleged that at that meeting, [with Beer] the plant superintendent stated, among other things, " . . . that the company was surprised and disappointed in my attitude toward the union".

The Employer witnesses flatly deny having made such a remark.

The Employer has the right and indeed the obligation to continue to operate its business even if that involves transfering a senior employee from night to day shift and the transfer of a junior employee from days to nights.

Such transfers are frequently necessary in an operation with nearly 150 employees working on two shifts in an industry (subcontracting in aerospace) which has great variations in the number of employees working and the number of overtime hours worked. Due to these rea-

sons and a modoerately high rate of employee turnover, transfers of employees are frequent.

The union and the field examiner picked out one transfer and decided that it was discriminatory since it happened to involve the employee who the union later chose to be its observer. The facts do not support such an inference. Yet the Regional Director states "were the transfer to be considered outside of the context of other conduct found during the investigation, I would recommend its dismissal" but he recommends that the election be set aside for reasons not stated in the objections.

The field examiner asked some questions concerning matters outside the scope of the objections. The Employer's witnesses, upon advise of counsel, refused to discuss these matters in aid of the "fishing expedition" of the field examiner.

ARGUMENT

The field examiner apparently spent considerable time, namely four months from the date of the filing of objections, to attempt to find some reason for setting aside the election prior to the completion of the report of the Regional Director. This is contrary to the usual policy of the N.L.R.B. to make an investigation of objections within a few days.

The Employer contends that objections must be spe-

cific. *National Furniture Company*, 119 NLRB 1. The Employer is entitled to receive a timely filed statement of the reasons for the union's objections. *Union Carbide and Carbon Corp.*, 99 NLRB 774; *Wilson - Sinclair Co.*, 191 NLRB No. 62.

Section 102.69(a) of the rules and regulations requiring that the objections "contain a short statement of the reason therefore. Such filing must be timely . . . "

The Board normally requires strict observation of its rules and regulations. *Warrensbury Board and Paper Corp.*, 143 NLRB 398, enforced 340 F.2d, 58 LRRM 2145 (CA 2, 1965).

The Employer was prejudiced by failure of the Union and the Regional Director to notify it of the specific grounds for the objections within a reasonable period of time after the balloting. This period of time is not three or four months after the balloting. Here the objections did not provide the Employer with specific grounds therefor within five days. The objections should be over ruled. *Northern Natural Gas Co.*, 191 NLRB No. 61.

The Regional Director finds that, standing alone, there is no merit to any of the objections, 1, 2 or 3 as filed by the Union. Prior to any findings that objection 3 is valid the Employer is entitled to a hearing to resolve the serious issues of credibility and to fill in the gaps purposely omitt-

ed by the field examiner in the Regional Director's report. The report does not even mention most of the great volume of testimony provided to the field examiner by Employer witnesses.

"OTHER EVIDENCE TO BE CONSIDERED"

The Employer contends that the Regional Director acted improperly under the circumstances by his findings stated in his report under "other evidence to be considered". The Employer, without waiving its right to contend that the additional findings were improperly made, will provide a summary of its views on each of the additional findings. These additional facts show that there is a substantial and material factual issue on each of the Regional Director's findings. The Employer is entitled to a hearing prior to any ruling that such additional findings may constitute grounds for valid objections.

ADDITIONAL FINDING NUMBER 1

The Employer denies any knowledge of the interrogation referred to in the finding. The Employer admits that there was a rumor that attempts were being made by a union to organize, but such rumors had been circulating for years and they never developed into the filing of an election petition for more than 10 years. If the Board rules that the statements made in the additional Findings are relevant and directs a hearing, Employer witnesses will tes-

tify that they deny the questioning of the employee referred to in this finding.

The report of the Regional Director shows that the questioning of the employee occurred on the day the petition was filed in the Regional Office. The N.L.R.B. stamp on this document shows that it was received in the Regional Office on October 24 at 3:46 p.m. It was received and stamped, in accordance with customary practice, by the Employer on October 26 at approximately 9:28 a.m. See the copy of the transmittal letter of Region 19 with the petition attached hereto. The petition was not filed and it was not received by the Employer until some time after the alleged conversation reported in Additional Findings No. 1. As such it does not constitute grounds for valid objections to an election. *Goodyear Tire and Rubber Co.* 138 NLRB 153; *Sheboygan Sausage Co.*, 156 NLRB 1490.

ADDITIONAL FINDING NO. 2

The Employer admits that its vice president of manufacturing held two meetings with employees, one the evening of October 25 and another early morning on October 26. The last such meeting was completed prior to any knowledge by the vice president of manufacturing that an election petition had been filed. The election petition was received by the Employer during the progress of the second meeting. However, if the Board finds that Ad-

ditional Finding No. 2 is relevant and directs a hearing, the vice president of manufacturing will testify that he had no knowledge that such a petition had been filed for a few hours after the completion of his last meeting with employees. At the time of said meetings the Employer did not know that a petition had been filed with the N.L.R.B.

The Employer denies that some of the statements alleged to have been made were even made. Part of the matter allegedly discussed in the meetings refers to the transfer of Bob Beer and of Bob Roeft, reported in Objection Number 3. The Employer contends that business reasons caused these transfers. Prior to the making of the decision to transfer Beer and Hoeft, the vice president of manufacturing will testify that he did talk with the approximately eight employees engaged in the set-up of automatic machines, but that the Union in no way was the cause of such discussions and later decision.

The Employer is prepared to provide testimony of witnesses to show that each of the matters alleged in Additional Finding Number 2 is either erronous or an incomplete statement of the facts, or that such matters were normal business decisions. The Employer also contends that any statements made are protected as free speech and are not grounds for a valid objection.

The meeting of the vice president of manufacturing prior to the receipt by the Employer of the petition, and

knowledge of its receipt, is not grounds for the filing of valid objections under the doctrine of *Goodyear Tire, supra; Connor Trading Co.*, 188 NLRB No. 43; *Westmont Engineering Co.*, 170 NLRB 13. Such a finding also imposes upon the Employer's right of free speech under the First Amendment.

ADDITIONAL FINDING NO. 3

The Employer admits that it conducted a management meeting on November 2 but alleges that in that meeting all supervisors were carefully instructed what they could properly say to employees and what they must not say concerning the election. If the Board finds that Additional Finding No. 3 is relevant and directs a hearing the Employer will provide testimony that it had had discussions with employees concerning a possible pension plan prior to the filing of the petition. The Employer denies that any statement made by management representatives constituted an implied promise of a pension plan benefit.

ADDITIONAL FINDING NO. 4

The Employer admits that its president spoke with employees at a meeting on November 16 in the afternoon. The president was carefully instructed what to say and what not to say, and we have a complete record as to what was said in that meeting. The president did not make the statement alleged in the first paragraph, last sentence, nor

the first sentence in the second paragraph. The president emphasized that the government social security benefits were to be improved so greatly on January 1 that all pension plans were of far less importance than at any prior date. In answer to several questions by employees the president truthfully admitted that he had studied a couple of pension plans but that he was not at liberty to discuss any pension plan then.

The Employer contends that there are serious issues of credibility in Additional Finding No .4 and that any statement made by management representatives in the November 16 meeting constitute only free speech.

ADDITIONAL FINDING NO. 5

The Regional Director contends that a statement made in the employee handbook (recently updated to accurately reflect existing practices) constitutes "an implied promise of benefit". That statement, referring to the shop committee, which had been referred to in prior editions of the employee handbook, states:

> Future planning includes adoption of a simplified system yet to be developed.

That statement is so vague and ambiguous that only someone searching for some grounds to set aside the election could consider it to be a promise of benefit. Nothing is promised here.

CONCLUSION

The Regional Director finds that none of the Union's three objections, standing alone, constitute grounds for setting aside the election. Yet, after four months of fishing, he has found five one-sided reports which he believes could have been grounds for setting aside the election if objections had been filed to name the conduct.

The additional findings of the Regional Director should be dismissed as not specifically covered by objections timely filed. However if the Board believes that they should be considered then the Employer is entitled to a hearing on the serious issues of credibility. The findings present substantial and material factual issues. The Employer has in no way waived any right to present its views on such matters, since the Regional Director acted improperly in considering the matters not covered in the objections but covered in his additional findings.

Dated at Yakima, Washington this 6th day of April, 1973.

WESLEY M. WILSON
605 Miller Building
Yakima, Washington 98901

CERTIFICATE OF SERVICE

I hereby certified that on this 6th day of April, 1973, I served a copy of the above Exceptions on the following parties to this proceeding by depositing on this date in the U.S. mail a postage pre-paid, properly addressed copy to each of the following:

Regional Director, Region 19
National Labor Relations Board
1000 Republic Building
Seattle, Washington 98101

Local Lodge 1531 Machinists
Edwin J. Carrig
1200 112th Ave. N.E.
No. 189
Bellevue, Washington 98004

WESLEY M. WILSON
605 Miller Building
Yakima, Washington 98901

NATIONAL LABOR RELATION BOARD
REGION 19
1000 Republic Building, 1511 Third Avenue
Seattle, Washington 98101 Telephone (206) 442-4532
October 25, 1972

Decoto Aircraft, Inc.
2801 West Washington Avenue
Yakima, Washington 98903

Re: Decoto Aircraft, Inc.
Case No. 19-RC-6371

Gentlemen:

Enclosed is a copy of a petition filed with this office. PLEASE POST THIS COPY ON YOUR EMPLOYEE BULLETIN BOARD.

Attention is called to your right and the right of any party to be represented by counsel or other representative in any proceeding before the National Labor Relations Board. In the event you choose to have a representative appear on your behalf, please have your representative complete "Notice of Appearance," Form NLRB-4701, and forward it promptly to this office.

Please submit as soon as possible to this office the following information:

(a) The attached commerce questionnaire filled out in the appropriate sections if you have not submitted such information in prior cases.

(b) Copies of correspondence and existing or recently expired collective bargaining contracts, if any, covering any of the employees in the unit alleged in the petition. (Names of any other

labor organization claiming to represent any of the employees in the proposed unit.)

(c) An alphabetized list of employees described in the petition together with their job classifications for the payroll period immediately preceding the date of this letter.

(d) Your position as to the appropriateness of the unit.

If a question concerning representation exists and if the parties do not utilize the consent election procedure, please be advised that a representation hearing will be scheduled in this matter at Yakima, Washington during the week of November 6, 1972.

No. 74-1561

SUPREME COURT, U. S.
FILED
JUL 30 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

DECOTO AIRCRAFT, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JULIUS ROSENBAUM,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-29) is reported at 512 F.2d 758. The Board's decision and order (Pet. App. 6-20) are reported at 209 NLRB No. 149. The Board's decision in a related representation case (Pet. App. 43-70) is not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*) was entered on April 7, 1975.[1] The petition for a writ of certiorari was filed on June 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1]The opinion of the court was dated March 6, 1975, but the court did not enter its judgment at that time.

QUESTION PRESENTED

Whether an employer's refusal, during the Regional Director's investigation of union objections to an election, to present evidence on allegations of other employer misconduct disclosed by the investigation, precludes the employer from contesting those allegations in a subsequent unfair labor practice proceeding based on the employer's refusal to bargain with the Board-certified winner of a second election ordered by the Board.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 31-38.

STATEMENT

1. On November 20, 1972, pursuant to a Stipulation for Certification Upon Consent Election (R. 5-6),[2] the Board's Regional Director conducted a secret-ballot election among petitioner Company's employees.[3] The tally showed 45 votes for and 49 votes against the Union, and one challenged ballot which was insufficient to affect the results (Pet. App. 8; R. 8). The Union filed timely objections, asserting, *inter alia*, that the Company had interfered with the election by threatening an employee who supported the Union with a shift change (Pet. App. 44; R. 10).[4] In addition, the Union alleged that the Company had interfered with the election by "other acts and conduct" (*ibid.*).

[2]"R." refers to the bound volume of the original papers comprising the record in the case, which was reproduced for use in the court of appeals. A copy has been lodged with the Clerk.

[3]The unit consisted of all production and maintenance employees at the Company's Yakima, Washington, operations (Pet. App. 13; R. 46, 48).

[4]The Union also raised two additional objections, which the Regional Director overruled (Pet. App. 44-51). The Board adopted his ruling, no exceptions having been taken by the Union (Pet. App. 3, n. 1).

Pursuant to Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. 102.69(c)), the Regional Director conducted an administrative investigation of the Union's objections, affording the parties a full opportunity to submit pertinent evidence (Pet. App. 44). During the investigation, he uncovered evidence of additional Company misconduct occurring prior to the election, which the Union had not specifically alleged.[5] The Regional Director notified the Company of this additional evidence and requested that the Company respond to it (Pet. App. 55-56). The Company proffered evidence concerning the change of shift, but refused to offer evidence concerning the additional matter which the Union had not specifically alleged (*ibid.*).

The Regional Director found that the uncontroverted additional evidence established that the Company had engaged in five acts that interferred with employee free choice in the election. He found that four of these acts related to and were thus part of the Union's original shift change objection, but that they also could stand independently as conduct that interferred with the election (Pet. App. 69). He further found that, while the shift change objection, standing alone, "does not rise to an act of interference with the election," that conduct, considered in the context of the other Company conduct, constituted undue election interference (Pet. App. 54, 68-69). Accordingly, he recommended that the election be set aside and a second election be held (Pet. App. 69-70).

[5]Employee witnesses had alleged, *inter alia*, that Company representatives had coercively interrogated the employees about protected activities and had promised them benefits if the Union were rejected (Pet. App. 55-56).

The Company filed with the Board exceptions to the Regional Director's finding and recommendation. Finding that the Company had received reasonable notice of the additional acts that were alleged to have interferred with the election, but nevertheless had refused to present any rebutting evidence to the Regional Director (Pet. App. 3, n. 1), the Board adopted the Regional Director's findings and recommendations, and issued an order setting aside the November 20 election and directing a new election (Pet. App. 3-5).

On August 15, 1973, a second election was held, which the Union won by a vote of 54 to 52 (Pet. App. 10, 13; R. 49, 55(b)). Neither party objected to the conduct of the election or challenged any of the ballots (Pet. App. 10-11). Accordingly, the Board certified the Union as the exclusive bargaining representative of the Company's production and maintenance employees (Pet. App. 13; R. 43).

2. The Company refused to recognize and bargain with the Union. The Union filed an unfair labor practice charge with the Board, and a complaint issued alleging that the Company's refusal violated Sections 8(a)(1) and (5) of the Act (Pet. App. 6; R. 44-47). In its answer, the Company admitted its refusal to bargain but challenged the propriety of the Board's action in setting aside the November 20 election and certifying the Union (Pet. App. 7; 48-49).

The General Counsel moved for summary judgment on the ground that all the matters raised by the Company had previously been raised and rejected in the representation proceeding (Pet. App. 7; R. 52-54),[6] and the

[6]The Company had previously requested the Board to permit the Board agent who investigated the Union's objections to testify and produce all employee statements involved in the representation proceeding (R. 50). The Board denied this request on the ground that, under the Board's rules (29 C.F.R. 102.118), statements of employees obtained during an administrative investigation are available for examination by a respondent only after the employee has been called to testify by the General Counsel at a formal hearing (R. 51).

Board issued a notice to show cause why the motion should not be granted (Pet. App. 7-8; R. 56). In its response (Pet. App. 8, 11; R. 67), the Company essentially renewed the contentions previously made, submitting in support of some of its contentions affidavits which were not alleged to reflect newly-discovered evidence (Pet. App. 11; R. 69-79). The Board granted summary judgment and found that the Company's refusal to bargain violated Section 8(a)(1) and (5) of the Act (Pet. App. 11-12, 14).

The Board's order requires the Company to cease and desist from the unfair labor practice found and from interfering with, restraining, or coercing its employees in any like or related manner in the exercise of their statutory rights; to bargain collectively with the Union upon request; and to post appropriate notices (Pet. App. 17-19).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 21-29). The court stated (Pet. App. 26):

> We are satisfied that the cumulative effect of the facts including those uncovered in the Regional Director's investigation warranted setting aside the initial election. These charges remained uncontradicted. Decoto's tactical choice to stand "on the pleadings" left the proceedings in the posture of a default.

ARGUMENT

The decision below, which turns on the facts of this particular case, is correct and does not warrant further review.

1. Although there is no statutory provision for post-election hearings, the Board has, by rule, provided for such a hearing if it appears that there exist "substantial and material factual issues." 29 C.F.R. 102.69(d). This procedure comports with the need that "questions preliminary to the establishment of the bargaining relationship be

expeditiously resolved * * * ." *National Labor Relations Board* v. *O. K. Van Storage, Inc.*, 297 F.2d 74, 76 (C.A. 5). Moreover, the burden of showing that substantial and material factual issues exist is not met by "'nebulous and declamatory assertions, wholly unspecified,'" but requires "'specific evidence of specific events from or about specific people.'" *United States Rubber Co.* v. *National Labor Relations Board*, 373 F.2d 602, 606 (C.A. 5). The Board and the court of appeals properly concluded that the Company failed to meet this burden by electing not to submit evidence to the Regional Director at the investigatory stage, and, instead, waiting to submit such evidence at later stages of the proceedings.

The Board is not limited to the precise allegations made by the parties, but has discretion to resolve objections and challenges on the basis of all of the facts obtained in its post-election investigation. *Independent, Inc.* v. *National Labor Relations Board*, 406 F.2d 203, 206-207 (C.A. 5); *National Labor Relations Board* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 179 (C.A. 6), certiorari denied, 389 U.S. 958. Moreover, in the interest of orderly procedure and the expeditious resolution of representation issues, the Board may properly require that proffers of evidence be timely made. See *National Labor Relations Board* v. *Rex-all Chemical Co.*, 370 F.2d 363, 365-366 (C.A. 1); cf. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37.

2. The evidentiary deficiencies in petitioner's defense would not be cured even if, as petitioner urges (Pet. 11), the exceptions signed by the Company's attorney (Pet. App. 71-81) were regarded as the equivalent of a verified pleading, for petitioner offered no satisfactory explanation for its failure to furnish the evidence to the Regional Director earlier.

Nor was the Regional Director's decision contrary to the Stipulation for Certification Upon Consent Election (Pet. 14-15) signed by the parties and approved by the Regional Director. The Stipulation provides, *inter alia*, that "[a]ll procedure subsequent to the conclusion of counting ballots shall be in conformity with the Board's Rules and Regulations" (R. 5). The procedures followed here did so conform.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,

JOHN S. IRVING,
Deputy General Counsel,

PATRICK HARDIN,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

JULIUS ROSENBAUM,
Attorney,
National Labor Relations Board.

JULY 1975.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

v. No. 74-2021

DECOTO AIRCRAFT, INC.,
RESPONDENT.

JUDGMENT

Before: Choy and Goodwin, Circuit Judges, and Burns,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board to enforce its order dated April 3, 1974, directed against Respondent, Decoto Aircraft, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on January 10, 1975, and has considered the briefs and transcripts of record filed in this cause. On March 6, 1975, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that:

Respondent, Decoto Aircraft, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

---

*The Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

(a) Refusing to provide information necessary and relevant for intelligent collective bargaining and to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Yakima, Washington, operations copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 19, (Seattle, Washington) National Labor Relations Board shall, after being duly signed by Respondent's representative, shall be posted by Respondent immediately

upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

With costs in favor of the
Board and against the respondent:

Cost of printing brief of NLRB	$192.60
Total	$192.60

SO ORDERED:

/s/ Herbert Y. C. Choy

Emil E. Melfi
Clerk

by:

/s/ Alfred T. Goodwin

Susan A. White
Deputy Clerk

U.S. CIRCUIT JUDGES

/s/ James M. Burns

U.S. DISTRICT JUDGE

Filed: April 7, 1975.

APPENDIX

NOTICE TO EMPLOYEES
POSTED PURSUANT TO A JUDGMENT OF THE
UNITED STATES COURT OF APPEALS ENFORCING
AN ORDER OF THE NATIONA LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Local Lodge 1531, International Association of Machinists & Aerospace Workers, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, provide information necessary and relevant for intelligent collective bargaining and bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All production and maintenance employees at the Respondent's Yakima, Washington, operations, excluding office clerical employees, professional employees, salesmen, guards, and supervisors as defined in the Act.

DECOTO AIRCRAFT, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10th Floor Republic Building, 1511 Third Avenue, Seattle, Washington 98101, Telephone 206-442-4532.